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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MARGIE BULLARD BARFIELD,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

WHETHER A CAPITAL SENTENCING SCHEME WHICH FAILS TO INFORM THE JURY OF THE MANDATORY CONSEQUENCES UNDER STATE LAW OF THEIR INABILITY TO REACH A UNANIMOUS VERDICT ON PUNISHMENT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS?

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STATE OF NORTH CAROLINA,

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RESPONSE TO PETITION FOR
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SUPREME COURT OF NORTH CAROLINA

Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules [for response to petitions filed "in forma pauperis"], the State of North Carolina responds to the petition of Margie Bullard Barfield and prays that this Court deny such petition on the basis of the facts and the authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

The Petitioner was tried, convicted and judgment of death was entered in the Superior Court of Robeson County, North Carolina. In an opinion reported in State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979), the Supreme Court of North Carolina found no error and affirmed the judgment of death. Thereafter, the Petitioner sought post-conviction relief in the Superior

Court of Robeson County, alleging ineffective assistance of counsel and various other purported constitutional errors in the trial of this case. After an evidentiary hearing the Superior Court of Robeson County entered an order denying relief. The Superior Court's opinion is unreported and is attached to the Petitioner's Petition as Appendix A. The Supreme Court of North Carolina thereafter denied review which Petitioner sought; that Order is attached to the Petitioner's Petition as Appendix B.

JURISDICTION

The Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

WHETHER A CAPITAL SENTENCING SCHEME WHICH FAILS TO INFORM THE JURY OF THE MANDATORY CONSEQUENCES UNDER STATE LAW OF THEIR INABILITY TO REACH A UNANIMOUS VERDICT ON PUNISHMENT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States:

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> "§14-17 . . . A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon, shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000."
>
> §15A-2000 [See Appendix C of the Petitioner's Petition for Writ of Certiorari.]

STATEMENT OF CASE

On March 28, 1978, the Robeson County Grand Jury returned a true bill of indictment charging the Petitioner with the murder of Stewart Taylor on or about 3 February 1978. After change of venue on Petitioner's motion, this charge was tried in the Superior Court of Bladen County beginning November 27th and concluding on December 2nd, 1978. At trial, the prosecution presented evidence that at the time of his death Stewart Taylor was approximately fifty-six years of age. He had been in fairly good health up until the time of his death. The Petitioner and Mr. Taylor had been dating for some period of time prior to his death and the Petitioner had obtained and forged a number of checks from the personal checking account of Mr. Taylor. Apparently, in fear of what he might do upon discovering such forgeries, she put Terro ant poison in his food and in his tea on January 31, 1978 and February 1, 1978. Thereafter, Stewart Taylor lived until February 3, 1978; however, he suffered nausea, vomiting, diarrhea, great pain in his muscles, chest and abdomen, and became very dehydrated. An autopsy performed at the request of the family revealed that Stewart Taylor died of acute arsenic poisoning. In a statement to authorities thereafter, the Petitioner admitted this poison-

ing, the poisoning of her mother, Lillie McMillan Bullard in 1974, the poisoning of Mrs. Dolly Taylor Edwards in 1976, and the poisoning of Mr. John Henry Lee in 1977. At the time of the poisoning of John Henry Lee, the Petitioner was a housekeeper and nurse's aide for Mr. Lee and had forged a check from Mr. Lee's personal checking account. At the time of the poisoning of Mrs. Edwards, the Petitioner was a housekeeper for the victim. At the time of the poisoning of her mother, the Petitioner admitted that she had forged her mother's name to a note in favor of the Commercial Credit Company of Lumberton and was afraid that her mother would find out about the note. Therefore, she put poison in her mother's soup and soft drinks. Subsequent autopsies of all of these victims revealed that they died of acute arsenic poisoning. Although the Petitioner did not admit any involvement in the death of her husband, Jennings L. Barfield, his body was exhumed by court order and toxicological screenings indicated that varying levels of arsenic were present in his body tissue. It was the opinion of the forensic pathologist that Jennings Barfield died of arsenic poisoning.

Through her confession and her testimony at trial, the Petitioner's evidence showed that she had a history of drug abuse and that she forged or stole money to support her drug habit. She thereafter, in fear of being caught, would then poison the persons from whom she took money.

The jury found the defendant guilty of murder in the first degree of Stewart Taylor; the jury also found, during the sentencing phase of the proceeding, that such murder was committed for pecuniary gain, was committed to hinder the enforcement of the law, and was especially heinous, atrocious or cruel. Upon finding such aggravating circumstances beyond a reasonable doubt, and upon finding that such aggravating circumstances were sufficiently substantial to outweigh the mitigating circumstances and to call for the imposition of the death penalty, the jury recommended that a sentence of death be imposed.

Pursuant to the provisions of G.S. 15A-2000(d), the Petitioner thereafter appealed her conviction and sentence to the Supreme Court of North Carolina. On November 6, 1979, that Court found no error and upheld this conviction and sentence. Following that decision, the Petitioner filed with this Court a Writ of Certiorari which was denied on June 30, 1980; her Petition for Rehearing was denied by this Court on September 17, 1980.

On October 3, 1980, the Petitioner initiated State post-conviction proceedings in the Superior Court of Bladen County. Such proceedings were transferred to the Superior Court of Robeson County and an evidentiary hearing was held on Petitioner's Motion for Appropriate Relief, which hearing commenced on November 17, 1980, and continued through November 21, 1980. On November 26, 1980, the Superior Court entered judgment denying and dismissing the Petitioner's Motion for Appropriate Relief. Thereafter, the Petitioner's Petition for a Writ of Certiorari to the Supreme Court of North Carolina to review the Superior Court's judgment was denied on July 9, 1981. The proceedings before this Court were then commenced.

REASONS WHY THE WRIT SHOULD NOT ISSUE

North Carolina law, G.S. 15A-2000(b), requires that the jury sentence recommendation in a capital case be unanimous. If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the trial judge then must impose a sentence of life imprisonment. Although the statute does not specifically provide that the jury will not be informed of the procedures to be followed upon their inability to reach a unanimous sentence recommendation, the North Carolina Supreme Court in two opinions has indicated that the jury should not be advised of the consequences of their inability to reach a unanimous sentence recommendation. [State v. Hutchins, ____ N.C. ___, 279 S.E. 2d 788, 807 (1981);

State v. Johnson, 298 N.C. 355, 259 S.E. 2d 752, 761-62 (1979).] The Supreme Courts of Virginia and Tennessee have reached a similar conclusion on this issue. [Justus v. The Commonwealth, 220 Va. 971, 266 S.E. 2d 87 (1980); Houston v. The State, 593 S.W. 2d 267, 278 (Tenn. 1980).] However, the Louisiana Supreme Court has reached a contrary conclusion. [State v. Williams, 392 So. 2d 619, 633-635 (La. 1980).]

The Petitioner now argues that there is such a conflict among the states on this crucial issue so that this Court must intervene on the issue to resolve the conflict. It is the opinion of the Attorney General of North Carolina that the decision of the Louisiana Supreme Court in State v. Williams, supra, is not well-reasoned, is not supported by the decisions of this Court, and does not therefore constitute the applicable law on this issue. It is further the opinion of this Attorney General that the decisions of the North Carolina Supreme Court, the Supreme Court of Virginia, and the Supreme Court of Tennessee, are well-reasoned and are supported by the decisions of this Court and therefore correctly resolve this issue. That being the case, there is no compelling necessity that this Court grant the Petitioner's request for certiorari to resolve this issue.

In State v. Johnson, supra, the defendant at trial requested an instruction by the trial court to inform the jury of the effect of their failure to reach a unanimous sentence recommendation. Assigning the trial court's failure to so instruct as error on appeal, the defendant raised such issue in the North Carolina Supreme Court. That Court in its opinion indicated that such an instruction "was not a proper matter for jury consideration." The Court indicated, "At best, the requested instruction would be of absolutely no assistance to the jury in making its recommendation. At worst, the instruction would permit the jury to escape the onerous task of recommending the sentence to be imposed." The Court made a similar

observation in State v. Hutchins, supra.

The Virginia Supreme Court addressed the same issue in Justus v. Commonwealth, supra, and made the following observation: "The court properly refused an instruction offered by the defendant which would have told the jury that if it could not reach agreement as to the appropriate punishment, the court would dismiss it and impose a life sentence. While this was a correct statement of law, it concerned a procedural matter and was not one which should have been the subject of an instruction. It would have been an open invitation for the jury to avoid its responsibility and to disagree." Likewise, the Tennessee Supreme Court reached a similar conclusion in Houston v. The State, supra. Tennessee law [T.C.A. §39-2404(h)] prohibits the judge or the attorneys from commenting at any time to the jury on the effect of the jury's failure to agree on punishment. In upholding this particular statutory provision the Tennessee Supreme Court said, "This statute does not deprive the jury of any knowledge of relevant evidence or aggravating circumstances or mitigating circumstances, necessary for them to fix punishment. It does no more than prevent the judge and counsel from informing the jury of the effect of its disagreement on which sentence should be imposed. The after-effect of a jury deliberation is not a proper consideration for the jury."

As noted by the North Carolina Supreme Court in Barfield and Hutchins, the decision of the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972), prohibits unbridled jury discretion in cases in which death is a possible punishment. This Court indicated in Furman that the State's statutory system in capital cases must be one which appropriately limits and guides jury discretion in the imposition of such sentences. Thus, for a statutory scheme in a capital case to pass constitutional muster, it must be one which will preclude a jury from arbitrarily recommending or causing to be imposed a sentence of death in a case in which under the facts and the law such sentence is unwarranted; likewise, that system must also preclude

a jury from arbitrarily recommending or causing to be imposed a sentence of life imprisonment where under the facts and under the law, death is the only appropriate sentence. Thus, it is the opinion of the Attorney General of North Carolina that Furman requires that the statutory scheme in the trial of capital cases must be one in which the jury will not be allowed to arbitrarily impose a death sentence where the law and the facts support the imposition of a life sentence; likewise, this system must be one in which the jury will not be allowed to arbitrarily impose or cause to be imposed a life sentence, where the law and the facts support a sentence of death.

Consistent with the requirements of Furman, the North Carolina legislature has enacted G.S. 15A-2000, effective June 1, 1977, which carefully limits and guides jury discretion in the sentence recommendation in capital cases. This statute, for the most part, closely resembles the statute enacted by the State of Georgia and upheld by this Court as constitutional in Gregg v. Georgia, 428 U.S. 153 (1976). The jury discretion allowed by this statute is, likewise, consistent with that allowed in Florida and Texas which was approved by this Court in Proffitt v. Florida, 428 U.S. 242 (1976) and Jurek v. Texas, 428 U.S. 262 (1976).

The North Carolina Supreme Court in its subsequent opinions construing G.S. 15A-2000, has indicated that the trial jury, the trial judge, and the trial prosecutor, all act within certain parameters of guided and limited discretion in sentencing. In State v. Jones, 299 N.C. 298,261 S.E. 2d 860 (1980) and in State v. Silhan, 302 N.C. 223, 275 S.E. 2d 450 (1981), the North Carolina Supreme Court indicated that neither the District Attorney nor the trial judge had the discretion to arbitrarily recommend or impose a life sentence where there is evidence of aggravating circumstances which should be submitted to the jury. Likewise, if the jury determines from the evidence and beyond a reasonable doubt that there are one or more aggravating cir-

cumstances and that these outweigh all mitigating circumstances and that these are sufficiently substantial to call for the imposition of the death penalty, the jury has no discretion in their recommendation. The jury may not ignore the evidence and the law which limits and guides their discretion. The jury may not arbitrarily and capriciously "choose to recommend mercy" without any meaningful direction or safeguards, any more so than they can arbitrarily and capriciously choose to recommend death.

The sentencing function of the jury in a capital case is a grave responsibility. In a constitutionally acceptable capital statutory scheme, both the State and the defendant are entitled to a sentence recommendation that is based solely on the facts of the case and the law. Given those facts and the applicable law, the jury must use its limited and guided discretion in fashioning a sentence recommendation. The jury must act within those guidelines and limits. The jury may not arbitrarily and capriciously act in favor of either side in making a sentence recommendation. The jury has no more right to arbitrarily impose a life sentence than it does to arbitrarily impose a death sentence. It is clear from the opinions of this Court in Gregg, Proffitt, and Jurek that the death penalty can be imposed only within a statutory framework in which there is guided and limited discretion which minimizes the risk of wholly arbitrary and capricious action. Any instruction by the trial court which informed the jury of an alternative procedure which would allow the jury to avoid its grave responsibility in sentencing, would broaden, as opposed to limit, jury discretion and would maximize, as opposed to minimize, the risk that the jury or a juror would act arbitrarily and capriciously. Thus, by such an instruction, the jury would become aware that it had the unbridled discretion to cause the imposition of a life sentence by simply failing to agree within a reasonable period of time. Therefore, such an instruction by

a trial judge to a jury in a capital case, would return us to a pre-Furman system whereby the jury would have the opportunity at their whim or pleasure to be merciful to some but not to others, with no enforceable guide or limit to their discretion. Such an instruction would render fatally defective an otherwise constitutional capital sentencing scheme.

Coming to a contrary conclusion, the Louisiana Supreme Court in State v. Williams, supra, made the following statement:

> " . . . [T]he members of the sentencing body were left free to speculate as to what the outcome would be in the event there was not unanimity. Under these circumstances, individual jurors could rationally surmise that in the event of disagreement a new sentencing hearing, and perhaps a new trial, before another jury would be required.
>
> Such a false impression reasonably may have swayed a juror to join the majority, rather than hold to his honest convictions, in order to avoid forcing parties, witnesses and court officials to undergo additional proceedings. Consequently, by allowing the jurors to remain ignorant of the true consequences of their failure to decide unanimously upon a recommendation, the trial court failed to suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action."

The Attorney General of North Carolina strongly disagrees with the above conclusion by the Supreme Court of Louisiana. Allowing the jury to remain uninformed of the consequences of their failure to decide unanimously upon a sentence recommendation is far less likely to bring about arbitrary and capricious action than is a procedure which instructs the jury of such consequences and thereby provides the jury [or an individual juror] with an opportunity and an invitation to abandon their responsibility. Irrespective of the circumstances and facts of the case, it provides the jury with the opportunity to ignore the limits on their discretion and to arbitrarily cause the imposition of a life sentence. Worst of all, such an instruction allows a single juror, without limit or restraint, to arbitrarily and capriciously cause such a result.

The old capital statutory sentencing schemes which were rendered fatally defective by Furman, which authorized a jury "recommendation of mercy" without guidance in the unbridled discretion of the jury, at least required that the jury act collectively in such a recommendation. The scheme now proposed by this Petitioner would allow a single juror to cause the imposition of a life sentence, knowingly, intentionally and arbitrarily, without such juror ever having to agree on anything. The Petitioner's proposed instruction to the jury would not minimize the risk of arbitrary and capricious action by a jury; to the contrary, such a proposed instruction would increase the risk of arbitrary and capricious jury action or inaction.

In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court gave the following mandate and explanation to the State of North Carolina and to the other states which utilize capital punishment:

> "This means that if a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.' [citations omitted] It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"

This Court in Beck v. Alabama, 447 U.S. 625 (1980), indicated that procedural rules in both the sentencing phase as well as the guilt phase of a capital case that tend to diminish the reliability of the guilt determination process or the sentencing determination will be invalidated. In evaluating these procedural rules, the Court notes that the final analysis is whether or not such rule "interjects irrelevant considerations into the fact finding process, diverting the jury's attention from the central issue. . ."

It is the opinion of the Attorney General of North Carolina

that an instruction similar to the one proposed by the Petitioner to a trial jury in a capital case would interject an irrelevant consideration into the fact finding process and would divert the jury's attention from their solemn responsibility to evaluate the facts under the law and to make a sentence recommendation.

CONCLUSION

The Respondent respectfully submits that the Petitioner's Petition for Writ of Certiorari should be denied for she fails to set forth any meritorious basis upon which relief should be granted. North Carolina General Statute §15A-2000 is constitutional as interpreted and applied by the North Carolina Supreme Court and by the Superior Court of Robeson County in this case. The Petitioner received a fair and impartial trial and was convicted upon overwhelming competent evidence. The sentence of death was imposed by a constitutionally acceptable procedure and such sentence is supported by the evidence. In this regard, the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. This sentence was imposed under an unambiguous statutory scheme which provides for limited and guided jury sentence recommendations which assure consistency, fairness and restrained discretion.

Respectfully submitted on this the 23rd day of September, 1981.

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CERTIFICATE OF SERVICE

I, Donald W. Stephens, Assistant Attorney General, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have on this date served a copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI upon the Attorneys of Record for Petitioner Margie Bullard Barfield, by depositing same in the United States mail, first class postage prepaid, and properly addressed as follows:

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This the 23rd day of September, 1981.

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